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(See attached for Counsel for Plaintiffs
and Plaintiff-Intervenor)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

JOSEPH A. PAKOOTAS, an individual
and enrolled member of the Confederated
Tribes of the Colville Reservation; and
DONALD L. MICHEL, an individual and
enrolled member of the Confederated
Tribes of the Colville Reservation, and
the CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION,

Plaintiffs,

And

STATE OF WASHINGTON

Plaintiff-Intervenor,

v.

TECK COMINCO METALS, LTD., a
Canadian corporation,

Defendant.

No. CV-04-0256-LRS

STIPULATION AND PROTECTIVE
ORDER

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654494.3/017053.00020

1 Plaintiffs Joseph A. Pakootas, Donald R. Michel, and the Confederated Tribes
 2 of the Colville Reservation (“Plaintiff” or the “Tribes”), and Defendant and Counter-
 3 Claimant Teck Cominco Metals Ltd. (“Defendant” or “Teck”)) (collectively, the
 4 Parties”), respectively submit the following Stipulation and [Proposed] Protective
 5 Order for consideration and entry by the Court.

6 Plaintiff and Counterclaim Defendant State of Washington (the “State”) does
 7 not oppose entry of this order, but does not join in this Stipulation and [Proposed]
 8 Protective Order, except for Paragraphs 24-36, in which it does join. The State is not
 9 bound by any provision of this Stipulation and [Proposed] Protective Order that it
 10 does not expressly join. The State will work informally with counsel for the Parties to
 11 address issues associated with confidential information.

12 Recitals

13 WHEREAS, Rule 26(c) of the Federal Rules of Civil Procedure grants the
 14 Court broad discretion to issue protective orders limiting disclosure or discovery in
 15 order to avoid “annoyance, embarrassment, oppression, or undue burden or expense.”

16 WHEREAS, Rule 502(d) of the Federal Rules of Evidence provides that the
 17 Court may order that privileges and protections are “not waived by disclosure
 18 connected with the litigation pending before the court—in which event the disclosure
 19 is also not a waiver in any other Federal or State proceeding.”

20 WHEREAS, Rule 502(e) of the Federal Rules of Evidence provides that “[a]n
 21 agreement upon the effect of disclosure in a Federal proceeding is binding only on the
 22 parties to the agreement, unless it is incorporated into a court order.”

23 WHEREAS, the Parties each have hard-copy documents and electronically
 24 stored information that are potentially relevant to this dispute but protected from
 25 disclosure by privilege or other protections (including work-product) (“Privileged
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1 Information”), and they wish to avoid any waiver of privileges or other protections,
2 except for intentional waivers made with the producing party’s explicit knowledge
3 and affirmative consent.

4 WHEREAS, the Parties each possess certain information, including, but not
5 limited to, financial information, trade secrets, constitutionally protected private
6 information, confidential research and development information and other types of
7 confidential information, which is of value and not in the public domain (“Proprietary
8 Information”), which could be subject to discovery or disclosure in this case, yet the
9 unrestricted disclosure of this Proprietary Information in the public domain would
10 likely cause significant and irreparable harm to the Parties and their respective
11 activities.

12 WHEREAS, the Parties expect to share Proprietary Information obtained
13 through discovery with their experts, consultants and others, including the Parties’
14 employees, attorneys and advisers.

15 WHEREAS, it may not be practicable or financially feasible for the Parties to
16 screen the millions of pages of potentially relevant material in this case to identify
17 every instance of Privileged Information or Proprietary Information, and the Parties
18 intend to employ computerized queries and other reasonable methods of
19 categorization to make these designations.

20 WHEREAS, the Parties seek to reduce the costs and burdens of discovery in
21 this case by ensuring that the legal privileges and protections that apply to Privileged
22 Information are not subject to any inadvertent, unintentional or unknowing waivers in
23 this or any other jurisdiction, to the full extent permitted by law and regardless of
24 whether the relevant efforts to avoid waiver, if any, are deemed reasonable or
25 unreasonable by non-parties.
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1 WHEREAS, the Parties also seek to preserve the full value and confidentiality
2 of their Proprietary Information and any Proprietary Information of others that they
3 have a duty to protect.

4 NOW, THEREFORE, the Parties have agreed to preserve the confidentiality
5 and privileged or protected status of discovered and discoverable documents and
6 electronically stored information, including all Privileged Information and Proprietary
7 Information, pursuant to this protective order ("Protective Order") according to the
8 following terms and conditions:

9 DESIGNATION AND TREATMENT

10 OF

11 "CONFIDENTIAL" DOCUMENTS AND INFORMATION

12 1. Documents and electronically stored information that constitutes
13 Proprietary Information may be designated as "Confidential" under this Protective
14 Order in the manner described below.

15 2. The term "Confidential" may be used to designate all sorts of Proprietary
16 Information including, without limitation, any type or category of: (a) hard-copy
17 documents and electronically stored information, including original written, recorded,
18 graphic or electronic materials, and all identical or non-identical copies thereof; (b)
19 discovery responses and collections, including answers to interrogatories, responses to
20 requests for admissions or production, deposition transcriptions and any of their
21 exhibits, attachments or enclosures; (c) copies, notes, abstracts or summaries of such
22 information, and the information itself; and (d) any pleading, affidavit, declaration,
23 brief, motion, transcript or other writing containing such information.

24 3. Documents and electronically stored information shall be designated as
25 "Confidential" by labeling them "Confidential" or, in the case of electronic files that
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1 cannot be conveniently labeled, indicating in some other prominent way that the files
2 are considered "Confidential."

3 4. Only non-public documents and electronically stored information
4 produced or obtained through discovery in this case may be appropriately designated
5 as "Confidential" under this Protective Order. "Confidential" is not properly applied
6 to any documents or electronically stored information that have been at any time:
7 (a) produced, disclosed or made available to the public or otherwise available for
8 public access outside of this litigation; or (b) disclosed in connection with a
9 governmental public filing or securities offering under circumstances in which it
10 would be unreasonable for the filer to expect confidential treatment. Notwithstanding
11 the foregoing, the Parties may designate as "Confidential" any Proprietary
12 Information disclosed to a governmental entity pursuant to a written confidentiality
13 agreement or under circumstances in which the documents or electronically stored
14 information ordinarily would be maintained in confidence pursuant to statute, rule or
15 regulation, legal process or customary agency practice.

16 5. Documents and electronically stored information designated as
17 "Confidential" shall be used solely by the receiving party for the prosecution or
18 defense of any phase of this litigation, Pakootas v. Teck Cominco Metals, Ltd., No.
19 CV-04-0256-LRS, including preparing for and conducting pre-trial, trial, and
20 appellate proceedings in this action, or other purposes or activities in connection with
21 this litigation that are properly within the authority of the parties under Washington
22 State and federal law.

23 6. Documents and electronically stored information that have been
24 designated as "Confidential" shall not be disclosed by the receiving party to anyone
25 except as provided herein, except pursuant to a court order. Furthermore, items
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1 designated as "Confidential" shall not be used by receiving Parties for any business,
 2 commercial or competitive purpose, or in any manner whatsoever in another case,
 3 litigation, proceeding or activity, whether private or public, factually related to this
 4 action or not.

5 7. The Parties shall take reasonable steps to designate only valuable,
 6 confidential Proprietary Information as "Confidential," and shall not indiscriminately
 7 designate documents as "Confidential."

8 8. If the Tribes wish to designate as "Confidential" any documents or
 9 information previously produced by Teck in the course of this litigation, they shall
 10 indicate which document(s) are to be deemed "Confidential" in a letter to Teck's
 11 counsel, and they shall attach a Bates-stamped copy of the item they wish to designate
 12 as "Confidential," appropriately labeled as such. The version of such an item
 13 designated as "Confidential" shall be used in all subsequent litigation proceedings.

14 9. At any time, any party may object to the designation of documents or
 15 electronically stored information as "Confidential" under this Protective Order, in
 16 which case the following process will apply:

17 a. The Parties shall meet and confer in an attempt to informally
 18 resolve the dispute.

19 b. If the informal process does not reach a resolution, the Parties may
 20 seek appropriate relief from the Court.

21 c. The burden shall be on the designating party to establish that its
 22 designations of "Confidential" are consistent with this Protective Order.

23 d. Any disputed items shall be treated as "Confidential," pending
 24 resolution of the dispute and until either the Parties agree that the disputed items shall
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1 not be treated as “Confidential” or the Court rules that the disputed items shall not be
2 treated as “Confidential.”

3 10. During the course of a deposition, a party may designate documents,
4 electronically stored information or testimony as “Confidential” pursuant to this
5 Protective Order, as follows:

6 a. The party making the designation shall have the corresponding
7 portion of the deposition record or the exhibit labeled as “Confidential.”

8 b. Counsel also may invoke the provisions of this Protective Order by
9 stating on the record during a deposition that testimony given at the deposition about a
10 particular document or disclosing particular information is subject to this Protective
11 Order or “Confidential.”

12 c. Access to any portion of a deposition transcript or exhibit
13 designated “Confidential” shall be limited pursuant to the terms of this Protective
14 Order.

15 d. Each deposition witness testifying about “Confidential” material
16 during a deposition shall be provided at the deposition with a copy of this Protective
17 Order and shall be advised on the record that he or she is bound by the terms of this
18 Protective Order and informed of the applicable legal remedies for violating this
19 Protective Order.

20 e. No person shall be present during portions of a deposition that
21 have been designated “Confidential,” unless that person is authorized under the terms
22 of this Protective Order to receive documents and information that have been
23 designated as “Confidential,” or unless that person receives the express consent to be
24 present from the party making the designation.
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1 f. The Parties shall have five (5) business days following receipt of a
2 final deposition transcript to designate portions of it or its exhibits as “Confidential.”

3 11. The Parties may designate as “Confidential” documents and
4 electronically stored information produced by third-parties. This includes both copies
5 of items previously designated “Confidential” and unique documents received from
6 the third-party and identified as “Confidential” for the first time. Designations of
7 third-party documents shall be made as soon as reasonably practicable, but not later
8 than thirty (30) days after receipt of the document or information. Designations of
9 third-party documents as “Confidential” shall be memorialized in a writing that lists
10 the Bates-stamp or other identifying characteristics of the designated document or
11 information, and, if less than an entire document or file is designated, a description of
12 the designated portions of the document and the basis for the designation, with
13 sufficient detail that an objecting party can determine what is at issue.

14 12. Nothing in this Protective Order affects the rights of the Parties, or any
15 third-party, to use or disclose their own Proprietary Information in any way, whether
16 or not it has been designated as “Confidential” in this case. The disclosure by one of
17 the Parties of its own Proprietary Information shall not constitute a waiver or alter the
18 protections of this Protective Order, and shall not entitle other Parties, non-parties or
19 their attorneys or their other agents to use or disclose such information in violation of
20 the Protective Order. Nevertheless, any disclosure or use by the designating party that
21 would prevent an item from being designated as “Confidential” pursuant to
22 paragraph 3, or that is inconsistent with its confidential status, shall serve as a basis to
23 object to the “Confidential” designation.

24 13. Documents and electronically stored information that have been
25 designated “Confidential,” along with copies or extracts of such materials and the
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1 information within them, must be maintained by the Parties in confidence and may
2 only be given, shown, made available to, or communicated to the following:

3 a. the Court, all Court personnel, the Special Master and his
4 employees or assistants or any settlement mediator;

5 b. Court reporters and videographers who record depositions or other
6 testimony in this action;

7 c. employees of copying, imaging and computer services for the
8 purpose of copying, imaging or organizing documents provided that all documents
9 designated as "Confidential" are retrieved by the party furnishing those documents
10 upon completion of the services;

11 d. the Parties, including any officer, director or in-house counsel of a
12 named party or its affiliated companies;

13 e. other employees of the Parties or their affiliated companies, but
14 only for the specific purpose of working directly on the litigation at the request or
15 under the direction of counsel;

16 f. outside counsel for the Parties, and employees and independent
17 contractors of such counsel to whom it is necessary that the documents be shown for
18 purposes of this litigation;

19 g. consultants and experts or others to whom it is necessary that the
20 documents be shown for purpose of assisting counsel and Parties in this litigation;

21 h. the author, addressees and recipients of the documents or any
22 person who would have had access to such information by virtue of his/her
23 employment; and

24 i. deposition witnesses.
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1 14. The Parties agree that certain documents or electronically stored
 2 information could be so sensitive that they reasonably should not be disclosed beyond
 3 the other Parties' outside- or in-house-counsel. With respect to such "Attorney's Eyes
 4 Only" materials, the Parties shall, as soon as practicable, bring the sensitive nature of
 5 the items to the attention of the other Parties' outside counsel, and the Parties shall
 6 meet and confer in an attempt to agree upon proper treatment of the materials. Any
 7 unresolved disputes shall be resolved pursuant to the Protective Order.

8 15. If someone other than the designating party desires to give, show, make
 9 available or communicate any documents marked or otherwise designated as
 10 "Confidential" to any person who is not specifically authorized to have access to such
 11 documents pursuant to the terms of this Protective Order, then the party intending to
 12 make such disclosure shall notify the producing party of such intent, not less than five
 13 (5) business days prior to the intended disclosure. Said notification shall be
 14 sufficiently specific to inform the producing party of the intended scope of the
 15 disclosure, including the name and/or job description of the person to whom such
 16 disclosure is intended. The Parties will then attempt to negotiate the terms of
 17 disclosure within two (2) business days of the notification. If no agreement can be
 18 reached during this shortened meet and confer period, then the party challenging
 19 disclosure may seek relief from the Court. All disputed items shall be treated as
 20 "Confidential" pending resolution of the dispute and until either the Parties agree that
 21 the disputed items shall not be treated as "Confidential" or the Court rules that the
 22 disputed items shall not be treated as "Confidential."

23 16. Each person (except for the Court, Court personnel, the Special Master,
 24 any settlement mediator, court reporters and videographers, copying, imaging and
 25 computer service employees and deposition witnesses) including any expert or
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1 consultant provided access to documents marked “Confidential” pursuant to the terms
 2 of the Protective Order shall, before gaining such access, receive a copy of this
 3 Protective Order and agree to abide by its terms. Nothing in this Protective Order
 4 shall require that non-testifying experts or consultants be deposed or otherwise be
 5 subject to discovery.

6 17. Any documents designated “Confidential” that are to be used or filed
 7 with the Court in this action and any pleading or other paper containing
 8 “Confidential” documents shall be, pursuant to any required approvals by the Court,
 9 sealed in conformance with applicable local rules of the United States District Court
 10 for the Eastern District of Washington.

11 18. A non-designating party intending to use at trial documents or
 12 electronically stored information designated as “Confidential” under this Protective
 13 Order shall give not less than five (5) business days’ advance written notice to all
 14 Parties. If any party objects to the use of such documents or electronically stored
 15 information at trial, then the party seeking the use at trial may seek relief from the
 16 Court. “Confidential” documents shall lose that status when they are first used in the
 17 course of the trial, at which point they shall no longer be considered “Confidential”
 18 documents. Any party wishing to maintain the “Confidential” status of documents
 19 used in trial shall have the burden of convincing the Court to issue an order continuing
 20 such designation.

21 19. In the event that it comes to the attention of an attorney for a receiving
 22 party that documents designated as “Confidential” have been inadvertently disclosed
 23 to someone not authorized under the terms of this Protective Order to receive such
 24 materials, then the attorney shall immediately give notice describing the
 25 circumstances of the unauthorized disclosure for counsel of record to the party who
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1 designated the document or information as “Confidential.” Additionally, upon
 2 recognizing any failure to treat documents designated as “Confidential” in the manner
 3 provided herein, the Parties shall immediately take such steps as are reasonably
 4 necessary to have the items placed under seal and/or restored to their confidential
 5 status, along with providing notice to the designating party.

6 20. In the event that documents or information designated as “Confidential”
 7 are inadvertently produced without the appropriate designation, such documents and
 8 copies thereof shall be returned to the producing party within five (5) business days of
 9 any written notice requesting their return to affix the appropriate designation and
 10 return them to the receiving party within five (5) business days, or they shall be
 11 immediately stamped by the receiving party as “Confidential” pursuant to the
 12 producing party’s request. Under no circumstances shall the inadvertent,
 13 unintentional or unknowing production of “Confidential” documents or information,
 14 or the giving of testimony claimed to be “Confidential” without so labeling the
 15 transcript during the deposition, constitute a waiver of the confidentiality designation.

16 21. The Parties may request reasonable extensions of the deadlines for
 17 designating their documents “Confidential” under this Protective Order, and such
 18 requests shall not be unreasonably denied.

19 22. Until the termination of proceedings of all phases of this action, including
 20 appellate proceedings, the Parties shall maintain the confidentiality of all documents
 21 and electronically stored information designated as “Confidential” under this
 22 Protective Order, unless they are no longer eligible to be designated pursuant to
 23 Paragraph 3 or they are used at trial without any restriction excluding them from the
 24 public record. This provision shall not apply to any documents that are the subject of
 25 a superseding ruling of the Court as to the scope of their disclosure. After the
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1 termination of proceedings of all phases of this action, including appellate
 2 proceedings, the Parties shall either return all documents and electronically stored
 3 information designated as “Confidential” under this Protective Order to the producing
 4 party or destroy such documents and electronically stored information and provide
 5 confirmation of the destruction to all parties.

6 23. The Parties intend to invite all non-parties who are subject to discovery in
 7 this litigation to join this Protective Order at their discretion. Accordingly, to the
 8 extent that any discovery is served on a non-party, the party serving the discovery
 9 shall provide the non-party with a copy of this Protective Order and specifically
 10 mention the non-party’s right to invoke or waive the terms of this Protective Order.

11 24. In the event that the State should receive a request for production of
 12 documents by a non-party made pursuant to the Washington Public Records Act,
 13 Wash. Rev. Code §§ 42.56. 001, *et seq.* (“PRA”), and said request would include
 14 documents designated as “Confidential,” the State agrees to give notice to counsel of
 15 record for the party who designated the documents as “Confidential,” of the request
 16 within five (5) working days of the request. If the party objects to the production of
 17 the documents by the State pursuant to the PRA, it shall be the responsibility of the
 18 designating party to seek timely and appropriate relief from the appropriate court to
 19 enjoin their disclosure. The burden to establish that the documents are exempt or
 20 excluded from disclosure to the public shall be as provided under the laws of the State
 21 of Washington. The State and the designating party shall advise the requesting non-
 22 party of this procedure so that said non-party may, if it so desires, participate in said
 23 state court matter. If the designating party seeks timely relief under the PRA in
 24 Washington State Superior court, the State shall not produce the documents pending a
 25 decision of the Washington State Court.
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DESIGNATION AND TREATMENT
OF
PRIVILEGED AND PROTECTED DOCUMENTS AND INFORMATION

25. The Parties shall take steps that are reasonable in their exclusive judgment to identify Privileged Information and to prevent its disclosure. This can include but is not limited to attorney screening, keyword search screening, metadata filtering, the application of advanced analytical tools, designation by subject matter, location or custodian where appropriate, any combination of these, or other methods not listed. The Parties shall not indiscriminately designate documents as privileged or protected from disclosure.

26. No inadvertent disclosure of Privileged Information shall constitute a waiver of any privilege or other protections (including work product) in this or any other proceeding if the producing party took reasonable steps, as defined herein, to prevent its disclosure and to rectify the error in the event of an inadvertent, unintentional or unknowing disclosure.

27. The producing party will be deemed to have taken reasonable steps to rectify an erroneous disclosure if, within ten (10) days of discovering the error and no later than ten (10) days following knowledge of an opposing party's use of such privileged information, the producing party notifies the receiving party of the claim of privilege and the basis for it and directs the receiving party to sequester, return, delete, or destroy all copies of the inadvertently produced Privileged Information.

28. Upon receiving such a request and notification of an inadvertent disclosure, or if a receiving party or its counsel self-identifies Privileged Information in a production, the receiving party shall promptly sequester, return, delete or destroy all copies of such inadvertently produced Privileged Information, including any and

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1 all work-product containing or derived from Privileged Information, and shall make
 2 no further use or disclosure of the Privileged Information whatsoever. The receiving
 3 party must notify the producing party if Privileged Information was disclosed before
 4 the receiving party received notification of its privileged status, and the receiving
 5 party must take all reasonable steps to secure the return of any Privileged Information
 6 of a producing party that the receiving party has disclosed.

7 29. Parties will act in good faith to timely produce privilege logs. The
 8 producing party will endeavor to provide all privilege logs to the receiving party by
 9 the producing party within thirty (30) days of the completed production of documents
 10 or electronically stored information pursuant to a discovery request. All privilege logs
 11 shall contain information sufficient to identify the documents or information withheld
 12 and the basis of the asserted claim of privilege or protection, with sufficient detail that
 13 an opposing party or the Court could make a cogent evaluation of whether the
 14 assertion of the privilege or protection was valid. The Parties shall create only a
 15 single entry in a privilege log for an email thread or string withheld on the basis of
 16 privilege or protection. A party's failure to produce a privilege log within thirty (30)
 17 days will not constitute a de facto breach of this Order.

18 30. Nothing in this Protective Order shall prevent a receiving party from
 19 challenging the assertion of privilege or other protection with respect to any
 20 documents or electronically stored information subject to discovery in this case;
 21 provided, however, that any challenge to Privileged Information that has been
 22 inadvertently produced must be made within five (5) court days after the producing
 23 party gives notice of the privilege or protection, by presenting the disputed
 24 information under seal with the Court for determination pursuant to Federal Code of
 25 Civil Procedure 26(b)(5)(B).
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31. Notwithstanding anything to the contrary herein: (a) Privileged Information that has been prepared by the Parties' outside lawyers during the pendency of this action is not subject to discovery in this litigation; and (b) the Parties shall not be required to reflect in any privilege log the communications of or with their outside counsel or their outside counsel's work-product prepared in anticipation of this litigation or during its pendency, provided that such communications and protected materials relate to the representation of the party in this case.

ADDITIONAL PROVISIONS

32. Before the expiration of a deadline under the Protective Order, the Parties may request reasonable extensions under the circumstances existing at the time, and such requests shall not be unreasonably denied.

33. The provisions of this Protective Order may be modified at any time by stipulation of the Parties approved by order of the Court. In addition, a party may at any time apply to the Court for modification of this Protective Order.

34. Nothing in this Stipulation and Order shall constitute: (a) an agreement by any party to produce any documents or other materials in discovery not otherwise agreed upon or required by court order or the Federal Rules of Civil Procedure; (b) a waiver by any person or party of any right to object to or seek a further protective order with respect to any discovery in this or any other action; or (c) a waiver of any claim of immunity or privilege with respect to any testimony, document or information.

35. The Parties expressly acknowledge that, by entering into this Stipulation, they do not waive any claims or defenses.

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DATED this 19th day of November, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November 2009, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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